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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 482

JOHN CROWLEY, CHARLES KERN and RICHARD T. CRICHE,

Respondents,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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The Scheffer Press, Inc.—ANdover 3-6850

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of The United States:

Now come the respondents, John Crowley, Charles Kern and Richard T. Criche, (plaintiffs and appellees in the Illinois courts), and by and through Ezra L. D'Isa, their attorney and file, this their brief in opposition to the petition for the writ of certiorari prayed for herein by the petitioner, Elgin, Joliet and Eastern Railway Company, (defendant and appellant in the Illinois courts), and says:

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Appellate Court of the First District of Illinois (included in petrs. pet., pp. 29-52), is officially reported as *Crowley* v. *Elgin, Joliet and Eastern Ry. Co.*, 1 Ill. App. 2d 481, 117 N.E. 2d 843. No other reported opinions were filed in the case. The Supreme Court of the State of Illinois denied[1] application of petitioner for leave to appeal[2] to that Court from the Appellate Court.

II.

JURISDICTION.

The petitioner seeks to invoke the jurisdiction of this Court on the ground that the construction of Federal Statute is involved; (28 U.S.C.A. 1257(3))—the statute being the Federal Employers' Liability Act. (45 U.S.C.A. 51). The theory upon which petitioner seeks certiorari in this Court does not raise a Federal question of substance,[3] but only a factual question of whether the defendant in the exericse of reasonable care should have anticipated that constant contact by its employees, with diesel fuel oils and sodium bichromates, could or might

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[1] The legal effect of that denial was an approval of the conclusion reached by the Appellate Court. (**Kelly v. Retirement Board**, 292 Ill. App. 390, 11 N.E. 2d 220, 222).

[2] The Illinois Supreme Court in cases of this character, in its discretion, reviews judgments of the Appellate Court on questions of law only. (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32, 88 N.E. 2d 12, 15), by petitions for leave to appeal from the Appellate Court to the Supreme Court, (Ill. Rev. Stats. 1949, Ch. 110, Pars. 199 and 259.32). The facts as found by the Appellate Court are ordinarily conclusive on the Illinois Supreme Court. (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32, 88 N.E. 2d 12, 15).

[3] This Court has said that before it will grant certiorari, the petition must show that a substantial federal question is involved. (**McArthur v. U. S.**, 315 U. S. 787, 62 S. Ct. 915; **Zucht v. King**, 260 U. S. 174, 176-177)

cause dermatitis—a question which this Court will not ordinarily re-examine.[1] This Court has said that its power over state judgments, "is to correct them to the extent they incorrectly adjudicate federal rights."[2] We submit the opinion of the Appellate Court demonstrates that court did not infringe upon any federal right by affirming the judgments in favor of respondents.

III.

THE QUESTIONS PRESENTED.

The petitioner admits that the only real issue in the case was the question of whether the defendant in the exercise of reasonable care should have anticipated that its employees, required by their work to come into contact with diesel fuel oil and bichromates, might or would develop dermatitis. As we suggested under a prior heading, this issue was purely factual; that the Appellate Court did not err in holding that there was ample evidence to carry that issue to the jury.

IV.

THE STATUTE INVOLVED.

As petitioner suggests, the only statute involved is Section 51 of the Federal Employers' Liability Act. (45 U.S.C.A. 51.) And while this case involves an occupational hazard, in counter-distinction to actual physical

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[1] **Just v. Chambers, 312 U. S. 383, 385, 61 S. Ct. 687; Milk Drivers' Union v. Meadowmoor Dairies, 312 U. S. 287, 61 S. Ct. 552; Great Atlantic & Pac. T. Co. v. Supermarket Eqpt. Co., 340 U. S. 147, 153-154, 71 S. Ct. 127. And see also, Page v. Arkansas Nat. Gas Corp., 286 U. S. 269, 52 S. Ct. 507; U. S. v. Johnson, 268 U. S. 220, 45 S. Ct. 496, where this Court held in substance that it would not review on certiorari, fact questions found in respondent's favor by both courts below.**

[2] **Herb v. Pitcairn, 324 U. S. 117, 65 S. Ct. 459.**

injury, this Court has held disability arising from such hazard is an "injury" within the meaning of the provisions of the Act.[3]

V.

RE-STATEMENT OF THE FACTS MATERIAL TO THE ISSUES PRESENTED.

Many of the facts stated by the petitioner, (hereinafter called "defendant") under its Statement of the Case (pet. p. 3) are either inadequately or misleadingly stated. Therefore, the respondents (hereinafter called "plaintiffs"), to enable this Court to properly evaluate the merit of defendant's contentions, have restated the material facts:

(a)

The evidence demonstrates the defendant knew or should have known the harmful effects of diesel fuel oil and bichromates, and should have taken adequate steps to protect its employees required to come into contact with such substances.

The evidentiary history of the work, and the conditions under which each of the plaintiffs developed dermatitis, demonstrates that the defendant, in the exercise of reasonable care, knew or should have known of the harmful effects of requiring its employees to work in diesel fuel oil, lubricating oils, and sodium bichromates, without taking proper precautions to protect them from the dangers of contact with such substances.

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[3] **Urie v. Thompson, 337 U. S. 163.**

(1)

The plaintiffs, their work and the manner in which they become disabled from contact dematitis.

(i)

John Crowley.

Mr. Crowley was 61 years of age (Abst. 44).[1] He was classified as a general machinist (Abst. 44), with 30 years of service with the defendant (Abst. 51). Between the years of 1920 and 1947 he did general repair work in the "back shop" (Abst. 55) at Joliet, Illinois, (Abst. 44) on steam locomotives (Abst. 44). In 1936, the defendant began to replace its steam locomotives by the use of diesel locomotives (Abst. 127-128). There was a complete change-over from steam locomotives to diesels as a motive power about the end of 1948 (Abst. 129; Add'l Abst. 23; Abst. 78; Abst. 92). It was because of this change-over in motive power that Crowley was assigned to work on diesels at the roundhouse in February 1947 (Abst. 44).

Prior to February, 1947, Crowley had no contact with diesel fuel oil (Abst. 44). He was in good health (Abst. 45). Crowley had an Eighth Grade education (Abst. 44). He had not been instructed by the defendant as to the possible ill-effects of coming in contact with this oil (Abst. 44-45). No orders, written or otherwise were received by him on this subject from his superiors (Abst. 45).

Prior to October, 1947 (when he first became afflicted with dermatitis; Abst. 47) he had no skin affliction of any kind (Abst. 44). When Crowley was assigned to work on diesels in the roundhouse at East Joliet, there were no

[1] Since we have not been served with a copy of the record filed in this Court, record references will be made to the Abstract of Records filed in the Appellate Court.

facilities in that roundhouse for the men to take shower baths, nor was any wash basin provided for the men to wash (Abst. 45). The only water available between February and November of 1947 was cold cloudy water from a pipe coming through the floor which drained into a funnel-shaped drain (Abst. 45). Crowley was not furnished with oilproof garments or protective ointments or soaps of any kind (Abst. 45; Abst. 70; Abst. 51; Add'l Abst. 22).

In the performance of his work for the defendant, he was required (1) to change lube and fuel oil fillers (Abst. 46); (2) to inspect engine bearings (Abst. 46; Add'l Abst. 13). In this work, his hands would come into constant contact with diesel and lube oils (Abst. 46; Abst. 48), as well as into contact with other parts of his body (Abst. 47-48). He came into contact with these oils every working day from February 1947 to November, 1947, when he first developed a rash on his hands, and on his arms as far as his elbows (Abst. 47). He first saw his own family physician in Joliet on November 20 or 21, 1947 (Abst. 48). When his condition did not improve, he asked his foreman to send him to the hospital. He was then sent to the Silver Cross Hospital in Joliet, and there saw Dr. Meadows, (the local surgeon for the defendant, (Abst. 34; Add'l Abst. 11; Abst. 17) on December 22, 1947 (Abst. 48). Dr. Meadows diagnosed his condition as contact dermatitis from diesel oil (Abst. 34-35). He continued to treat him (Abst. 49; Add'l Abst. 13) until after January, 1948 (Abst. 48). When his condition failed to improve he sent Crowley to the Northwestern University Clinic in Chicago on January 2, 1948 (Abst. 48-49). When Dr. Meadows first saw Crowley on December 22, 1947, he made an official report to the defendant's chief surgeon

R. J. Bennett, in Chicago (Abst. 33) on the forms provided by the defendant (Abst. 34). In that official report he found Crowley's condition was caused by "working near diesel oil" and made a diagnosis of Crowley's malady as "contact dermatitis from diesel oil" (Abst. 34-35; Plaintiff's Exhibit No. 5).

On December 22, 1947, at the request of Dr. Meadows, Crowley was transferred back to work on steam engines (Abst. 51-52), where he worked until February, 1948, when he was again transferred back to the roundhouse and placed at work on diesel locomotives (Abst. 52; Add'l Abst. 16).

Crowley described his physical condition resulting from this dermatitis (Abst. 48-49), the treatment he received for this condition (Abst. 48-49; Abst. 50) and his present condition (Abst. 50-51; Add'l Abst. 15; Add'l Abst. 22). Dr. Robin saw him on April 14, 1949 and described his condition then. (Add'l Abst. 30; Abst. 100-103; Add'l Abst. 31); and at the time of the trial (Abst. 102), photographs of Crowley appear in the record (Abst. 50, Plaintiff's (Crowley's) Exhibits Nos. 8 & 9) His hands and arms were exhibited to the jury (Abst. 50).

Dr. Robin was of the opinion Crowley's condition was permanent (Abst. 103). The defendant offered no evidence to the contrary although its doctors had treated him. However, the testimony of defendant's expert, Dr. Schwartz, in effect, confirms this finding, since he says it is doubtful if dermatitis of long standing, by a person over 60 years of age, can be cured (Abst. 121-122).

Crowley lost approximately 329 days from his work on account of this condition from December, 1947 to September, 1952 (Abst. 53-54, Plaintiff's Exhibits No. 10-

10A). His rate of pay prior to 1947 was $12.50 per day (Abst. 45). Now it is $16.58 per day (Abst. 69).

His lost time and medical expense (Abst. 55) totals approximately $5,000.00.

(ii)

Charles Kern.

Mr. Kern was a pipe fitter who was 68 years old (Abst. 72). He had worked continuously for the defendant for 37 years (Abst. 72). Prior to February 5, 1949, he was in good health and had no skin affliction (Abst. 72). He has been working on diesel locomotives since August, 1948 (Abst. 72). In connection with his work of making running repairs to diesels, he comes into constant contact with diesel fuel oil and lube oil equipment (Abst. 73).

He had never made a study of the ill effects of working in diesel oil (Abst. 73), and did not know that contact with that oil, prior to February, 1949, would affect him. No one had ever told him about the ill effects therefrom. (Abst. 73).

On February 5, 1949, he developed dermatitis on his hands, face, neck and feet (Abst. 73), having previously noticed in January of 1949 that his hands were red and had a "burning irritation." He first saw Dr. Meadows on February 5, 1949 (Add'l Abst. 7), who found at that time he had "an itch, rash, on the back of his hands and forearms." On Dr. Meadows' orders he was hospitalized for two weeks (Abst. 23; Abst. 74).

Kern described the condition when he went to see Dr. Meadows. (Abst. 74)

Dr. Meadows treated him for a time (Abst. 23) and when he apparently did not improve, sent him to the

defendant's dermatologist, Dr. Cobin (Abst. 30-31). Dr. Meadows made an official report of the results of his examination of Mr. Kern to the defendant's chief surgeon, Dr. Bennett, in which he found the cause of Kern's condition as follows: (Abst. 36; Plaintiff's Exhibit No. 6) "Working in diesel oil developed rash on hands," and made a diagnosis of "contact dermatitis of hands and forearms." (Abst. 37)

Dr. Cobin first saw Kern on March 24, 1949, and described his condition and what he did for him (Abst. 25-26; Abst. 27).

Kern was also examined and treated by Dr. Robin (Abst. 103) who described his findings at that time (Abst. 103-104). He examined him again just prior to the trial and again stated his findings at that time. (Abst. 104-105)

Kern's salary in 1949 was $12.00 per day (Abst. 74). His scale at the present time is $18.40 per day (Abst. 78). Kern described his present condition of his spine, face and neck as "itchy" and said that "since 1949 the condition of my skin has changed very little. It bothers me very bad and the irritation is still severe" (Abst. 75-76; Add'l Abst. 22-23). His arms and hands were exhibited to the jury (Abst. 75).

He lost a total of 118 days from his work (Abst. 76-77) making his salary loss during that period of time approximately $2,500.00.

(iii)

Richard T. Criche.

Mr. Criche is a machinist and has been employed by the defendant at Joliet for 32 years (Abst. 86). He is 52 years old (Abst. 86).

Prior to June 7, 1949, he was employed in the roundhouse where he was engaged in making running repairs on steam locomotives (Abst. 86-87).

In the early part of 1948 he was assigned to work on diesel locomotives, exclusively, (Abst. 87). In connection with his work on these engines, carrying out his assigned duties, his hands would become saturated with fuel oil and it would sometime get on his face and clothes (Abst. 87).

Prior to commencing work on the diesel locomotives he did not know anything about danger from fuel and lubricating oils. No one had ever given him any instructions about the danger of exposure to those oils at the E. J. & E. He had only an 8th grade education and had never had any special training in this connection (Abst. 87).

The defendant did not furnish him with protective ointments, soaps, scrubing fluids, gloves, work clothes, or other protective devices prior to June 1949 (Abst. 91).

In June of 1949 his skin developed a burning and "itchy" sensation and had little water blisters. He saw his foreman who sent him to Dr. Meadows (Abst. 88), where he was treated (Abst. 23). He was then referred to Dr. Cobin (Abst. 88) who commenced to treat him on July 7, 1949. He remained under the care of this doctor until June 28, 1951. Dr. Cobin diagnosed his ailment as "contact dermatitis". (Abst. 26).

This plaintiff's condition was described by himself (Abst. 88; Add'l Abst. 26-27), by Dr. Meadows (Abst. 23), by Dr. Cobin (Abst. 27-28), and by Dr. Robin, who first saw him on February 13, 1950 (Abst. 105). His present condition was also described (Add'l Abst. 27).

Dr. Meadows in his official report to Dr. Bennett, dated June 7, 1949, found Mr. Criche had developed a rash on both hands from "working in diesel oil" and diagnosed his condition as "contact dermatitis" (Abst. 32-38, Plf's. Ex. No. 7).

This plaintiff described his present condition (Abst. 89) as did Dr. Robin who examined him again on the day of the trial (Abst. 105).

Criche's salary was $12.00 a day (Add'l Abst. 26; Abst. 88). He lost approximately 199 days from his work (Abst. 88-91) of a total salary loss of approximately $1,500.00.

(2)

Notice.

The defendant had or could have had notice of the probable ill effects of requiring its employees to work in diesel fuel oils, and chromate solutions.

Dr. Cobin (defendant's own dermatologist) testified that it had been known for 22 wears that certain oils would produce dermatitis (Add'l Abst. 10, Abst. 28).

When Dr. Cobin saw Mr. Kern on March 24, 1949, (Abst. 25) and Mr. Criche on July 7, 1949 (Abst. 26) he knew they had been in contact with fuel oil (Add'l. Abst. 10).

Dr. Meadows, when he first saw Mr. Crowley on December 22, 1947, found that his condition was caused from "working near diesel oil" and made an "objective findings (diagnosis)" that this plaintiff was afflicted with "contact dermatitis from fuel oil" (Abst. 34-35, Plf's. Ex. No. 5). Dr. Meadows also made the same findings and so officially reported to Dr. Bennett on Mr. Kern

on February 5, 1949 (Abst. 36-37, Plf's. Ex. No. 6) and on Mr. Criche on June 7, 1949, (Abst. 37-38, Plf's. Ex. No. 7). On December 22, 1947, Dr. Meadows issued an order that Mr. Crowley was not ' work around diesel oil (Abst. 139, Deft's. Ex. No. 1).

It was not until January of 1950 that the defendant took affirmative steps to publicize the danger from working in diesel fuel oil. Letters were issued to the plaintiffs, on or about January 30, 1950, advising them of the danger of contact with diesel fuel oils (see Deft's. Ex. No. 4, Abst. 33; See also Plf's. Ex. No. 1, Add'l. Abst. 3), and by posting bulletins containing the same information as contained in these letters (Abst. 81; Plf's. Ex. No. 12). In the March 1950 issue Dr. Bennett wrote an article for the defendant's Magazine "Milepost" containing this same information (Abst. 30, Rec. 193A, Plf's. Ex. No. 3).

Dr. Bennett testified that since 1927 it was known that petroleum in certain concentrations could cause skin irritations (Add'l. Abst. 11; Abst. 32-33).

Dr. Bennett knew prior to 1947, that rubber gloves were proper prophylactics for exposure to fuel oils (Add'l. Abst. 12).

Defendant's own witness, Dr. Schwartz, testified that in 1942 he knew that petroleum and its derivatives were a cause of dermatitis; that he had known that since 1930. In Dr. Schwartz's book, published in 1939, he wrote about "the hazard of exposure to petroleum oil and its derivatives insofar as dermatitis is concerned". (Abst. 124).

The defendant said that prior to 1947, soaps and corn meal scrubbers were made available, but not for a specific purpose (Abst. 41). None were furnished by the defendant for the roundhouse.

Mr. Crowley testified that when he returned to work in February, 1948, there were no bulletins posted with reference to the use of diesel oil (Abst. 68), nor was any ointments or protective creams furnished to him (Abst. 85).

While the defendant urged cleanliness as an effective preventative against contact dermatitis from fuel oil (See bulletin—Plf's Ex. No. 12, Abst. 81), there were no washing facilities in the roundhouse prior to June 1949. Wash basins and showers were not installed there until May 1950 (Abst. 91).

It is also significant to note that plaintiff's exhibit No. 5,[1] (Abst. 34) was a report of plaintiff Crowley's condition, from Dr. Meadows, defendant's "local surgeon" at Joliet, Illinois, (Abst. 35, Abst. 17) on the forms of the defendant furnished by it to Dr. Meadows (Abst. 34) to defendant's chief surgeon, Dr. R. J. Bennett at Chicago, Illinois. In this report Dr. Meadows reported to Dr. Bennett the result of his examination of the plaintiff, John Crowley on December 27, 1947. (Abst. 34). This report shows the following:

> "E. J. & E. Ry. Co. Surgical Department, Joliet Works, mine or station—Surgeon's Report.
>
> "Register No. 534, Check No. 18.
>
> "Name: John Crowley, Date December 22, 1947, 10:00 A. M.
>
> * * * * *
>
> "Etiology: Working near fuel oil.

[1] This report has been adverted to under our statement of the facts. It is here set forth because the Appellate Court was of the opinion this report was "significant" because Dr. Meadows when he first saw Crowley on December 22, 1947, "diagnosed his condition as contact dermatitis from diesel oils." (Pet. p. 49).

"Subjective Symptoms: Rash with few small pustules on both hands and arms to elbows.

"Objective Findings: (Diagnosis) Contact Dermatitis from Diesel oil."

Thus it affirmatively appears from the foregoing report, there was nothing mysterious about the malady with which Dr. Meadows found plaintiff Crowley was afflicted, the first time he examined him. The suggestion of defendant that it could not have known the nature of Crowley's affliction or its source, is thus directly contradicted by its own records.

The defendant, through various doctors employed by it, sought to cure plaintiff Crowley of dermatitis, as late as April 14, 1949, when he was seen by Dr. Robin.

Plaintiff Kern did not develop dermatitis until February 5, 1949. At that time Dr. Meadows made a formal report to Dr. Bennett, defendant's Chief Surgeon, that this plaintiff was afflicted with contact dermatitis from working near diesel oil. (Abst. 36, Pltf's. Ex. No. 6). Thus the defendant knew from plaintiff's Crowley's case, for more than a year prior to the time Kern contracted contact dermatitis that diesel oils and bichromates would cause dermatitis.

Plaintiff Criche did not develop contact dermatitis from diesel oils until June 7, 1949, when he was examined by Dr. Meadows, who then diagnosed his condition as "contact dermatitis" from "working in diesel oil" (Abst. 32-33; Pltf's. Ex. No. 7).

The only actual inquiry, therefore, is whether the defendant had notice, actual or constructive, of the dangers of dermatitis from fuel oils and sodium bichromates prior to the time Crowley contracted that malady on December 27, 1947. Certainly, by no stretch of the imagination could it be said that the defendant did not have notice of these dangers at the time Kern and Criche contracted this same malady from this same source, over a year after it had been acquired by Crowley.

VI.

ARGUMENT.

(a)

The Appellate Court correctly held that the defendant was not entitled to a directed verdict in the trial court.

The Appellate Court in discussing the question of whether the trial court correctly refused to direct a verdict for the defendant said: (pet. pp. 45-46)

> "The question presented by defendant's motion for judgment notwithstanding the verdict is whether there is any evidence fairly tending to prove the cause of action. The court accepts as true, evidence in favor of the plaintiff and gives him the benefit of all favorable inferences that might be reasonably drawn therefrom. *Halloran* v. *Chicago & N. W. Ry. Co.*, 327 Ill. App. 217 (Abst.); *O'Neal* v. *Caffarello*, 303 Ill. App. 574. In *Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, the Federal Supreme Court said that to deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them, citing *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 354. In *Lavender Adm.* v. *Kurn, et al.*, 327 U. S. 645, the court said (653): 'Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.' "

And thereupon the Court cited and quoted from *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653. It, therefore, concluded that the trial court did not err in refusing to direct a verdict for the defendant, saying, (pet. p. 49):

> "There is evidence that defendant could or might have known that repeated or continual contact with

diesel fuel and lubricating oils and with chromate solutions would cause dermatitis. There is evidence that notwithstanding this knowledge the defendant took no preventative measures until after plaintiffs had contracted dermatitis. **We are of the opinion that the court was right in overruling defendant's motions for judgment notwithstanding the verdict.**" (Emphasis supplied)

The Appellate Court on the record before it was amply justified in reaching this conclusion, upon the facts adverted to above.

(b)

The Appellate Court correctly held the issues presented questions of fact for the jury.

The Appellate Court also refused to follow the suggestion of defendant that the decision in the *Young* case (*Young* v. *Pennsylvania R. Co.*, 2 Cir., 197 F. 2d 727) resulted from an inadequate presentation of the issues to the Second Circuit of the U. S. Court of Appeals (pet. p. 47). The Appellate Court expressly approved the logic of that case which held that the question of whether the railroad in the exercise of reasonable care, should have taken measures to guard against the risk presented, was "a jury question". (pet. pp. 46-47)

In addition to the *Young* case (*Young* v. *Pennsylvania R. Co.*, 2 Cir., 197 F. 2d 727) cited above, the Missouri Supreme Court very recently had occasion to consider this same question in *Evinger* v. *Thompson*, (Mo. 1954), 265 S. W. 2d 726. That court in its opinion, said, (p. 730):

"• • • we must hold that defendant's knowledge, actual or constructive, of the **harmful characteristics of the sodium chromate compound was a jury question.** It must be remembered that this is a Federal Employers' Liability Act case and that the question

of negligence under that Act is to be determined by common law principles as established and applied in the Federal courts. *Urie* v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282. The *Urie* case means that it was negligence within the meaning of the act, if defendant knew or by the exercise of due care should have known, that its standards of conduct (in the use of the compound) were inadequate to protect plaintiff and similarly situated employees. 69 S. Ct. loc. cit. 1028." (Emphasis Supplied).

The foregoing case, together with those cited by the Appellate Court in its opinion demonstrate that the judgment of that court was a correct disposition of the case in that court.

Nor is there any merit to the contention of the defendant that the cases cited by it in its petition, (pp. 23-24), hold as a matter of law that the trial court should have directed a verdict for the defendant because the defendant had no knowledge of the harmful propensities of diesel fuel oil, lubricating oils and sodium bichromates.

The Appellate Court in its opinion discussed this contention of the defendant. (pp. 48-49 of pet.), and after citing *Young* v. *Pennsylvania R. Co.*, 2 Cir., 197 F. 2d 727, (adverted to above); *Baumgartner* v. *Pennsylvania R. Co.*, 292 Pa. 106, 140 A. 622, (both Federal Employers' Liability Act cases) and *Harvey* v. *Welsch*, 86 N. H. 72, 163 A. 417), concluded by saying:

"In the instant case the jury was instructed that the burden was upon each of the plaintiffs to prove by a preponderance of the evidence that prior to the time he contracted his dermatitis the defendant had actual knowledge of or, in the exercise of reasonable care would have known that the plaintiff or any other employee similarly employed, was reasonably likely to contract a dermatitis from such contact that he might reasonably be expected to have with the oils

used on or about the diesel locomotives. In our opinion, **whether the defendant could or might have known of the dangers to the plaintiffs from the exposure to the diesel oils and chromates, was a question of fact for the jury.** We have come to this determination after a careful reading of the transcript of the evidence, the briefs and the cases dealing with the proposition." (Emphasis supplied)

We submit that the finding of the Appellate Court was in conformity with the law and the evidence.

The defendant in its petition, (pp. 23-24), cites several cases which it says sustain its contention. A résumé of these cases demonstrate they are not in point.

These cases are not Federal Employers Liability cases. *Grammer* v. *Mid-Continent Petroleum Corp.*, 10 Cir. 71 F. 2d 38, was a common law action based upon death resulting from pneumoconiosis allegedly acquired while the decedent was engaged in cleaning out petroleum stills. This case is distinguishable on many grounds. (1) Plaintiff's doctor could not explain the cause of his death and, therefore, "deduced" it was caused by conditions arising out of his employment; (2) The plaintiff had been furnished with respirators to use in his work; (3) It was also said the plaintiff assumed the risk, and the court further said (4), "Occupational diseases are a part of the hazards of the industry." The foregoing observations so fully distinguish this case as to make further comment unnecessary.

Allen v. *Shell Petroleum Corp.*, 146 Kan. 67, 68 P. 2d 651 was also an action based upon common law negligence for damages because of a disease or disability acquired while employed in and about a distillery. The action was apparently based upon disability of plaintiff caused (p. 655) "by vapors, gases, or fumes." But his doctor "thought

this man's coming in contact with a hard flinty material is what caused the trouble." The plaintiff was unable to produce any medical authority that contact with the gases or fumes in question would produce plaintiff's condition. Plaintiff's doctor testified (p. 651) "he knew of no medical authority which supported the theory that plaintiff could have gotten such a disease at a refinery." In addition, the plaintiff was furnished with masks and instructed (p. 654) "concerning their availability and uses." The reasoning in this case is based upon the decision in the *Grammer* case cited and discussed above.

Spence v. *Bath Iron Works Corp.*, 140 Me. 287, 37 A. 2d 174 does not sustain defendant's contention. In that case the plaintiff was engaged in stripping armor and insulation from cables built to specifications of the U. S. Government for construction of naval craft. In the stripping process a material known as "halowax" flaked off in considerable quantities. This wax apparently caused a form of acne. It is apparent that defendant had no knowledge of this occupational hazard, since the material used was built to specifications of the U. S. Government.

The defendant on page 25 of its petition also cites *Bennett* v. *Pilot Products Co.*, (Utah) 235 P. 2d 525, 26 A.L.R. 2d 958, and *Stanton* v. *Sears, Roebuck & Co.*, 312 Ill. App. 491, having to do with the question of the liability of the employer, where the employee is allergic or has unusual susceptibility to injury from a particular product used by the employer.

This is contrary to defendant's contention in the trial court, *i.e.*, that plaintiffs developed dermatitis because each of them were particularly susceptible to, or likely to develop dermatitis from contact with diesel fuel oils, lubricating oils and sodium bichromates. Its contentions

were quite the opposite. Defendant's counsel in his opening statement to the jury said, in part, (Add'l. Abst. 2):

> "The evidence will show these men (referring to plaintiffs) were treated by the doctors to whom the railroad company sent them as the problem became more acute, as it became apparent that this was not a matter of an allergy or individual susceptibility of these men who first broke down with it;" (Emphasis supplied).

Another case cited by the defendant to sustain this contention is likewise not a F. E. L. A. case. *Pinkley* v. *C. & E. I. R. R. Co.*, 246 Ill. 370, was a common law action for injuries sustained by one of its employees when he was poisoned from handling creosoted timbers. The court held that the plaintiff knew the danger of handling creosoted timbers (p. 378), and the defendant was under no duty to warn him of such danger. The court saying, that the fact the appellee (plaintiff) received more injuries than he anticipated, and resulted in a disease of a permanent character did not render the defendant liable.

(c)

The medical reports of defendant's local surgeon to its chief surgeon were competent evidence to show notice.

The Appellate Court also correctly rejected defendant's contention that the reports of its own "local surgeon" —Dr. Meadows, to defendant's chief surgeon, Dr. R. J. Bennett, were "hearsay" and for that reason incompetent. In this respect, the Appellate Court said, (pet. p. 49):

> "Defendant argues that the court erred in admitting the medical reports made out by Dr. Meadows and transmitted to Dr. Bennett because they are hearsay and therefore incompetent and inadmissible. These reports were offered to prove that the defendant knew, through its own doctors, that diesel

fuel oil caused the dermatitis with which plaintiffs were afflicted. These reports were properly received in evidence as admissions against interest."

The Appellate correctly decided these questions against the defendant.

The evidence to which defendant's objections were leveled were plaintiff's Ex. No. 5, (Abst. 34); plaintiff's Ex. No. 6, (Abst. 36) and plaintiff's Ex. No. 7, (Abst. 37), being the reports submitted by Dr. Meadows to Dr. Bennett on each of the plaintiffs.

The evidence shows these reports were reports made by Dr. Meadows in the regular course of the business of the defendant, to its chief surgeon, Dr. R. J. Bennett. These reports were offered to prove that the defendant knew, through its own doctors that diesel fuel oil caused the dermatitis with which plaintiffs were afflicted. They were offered as admissions against interest (Abst. 34). The defendant, as we stated above, objected to their admission because it said these documents were incompetent because they were "hearsay" evidence. (Abst. 34). There was no legal merit to this contention.

Throughout the trial the defendant contended, and as it here contends, it had no knowledge or notice that diesel fuel or lubricating oils were harmful to its employees. The reports in question show in each instance, according to the findings of defendant's own doctors, that each of the plaintiffs had contracted dermatitis from contact with diesel fuel oil. The defendant's objections that these documents were "hearsay" was without merit. Since they were offered as admissions against interest, they were not subject to the objections on this ground. (*Schikora v. Freeport Motor Casualty Co.*, 320 Ill. App. 359, 51 NE. 2d 75). These reports were admissible for the purpose

offered. (*Beringer* v. *Lackner*, 331 Ill. App. 591; *Peterson* v. *Midwest Transfer Co.*, 344 Ill. App. 167).

The cases cited by the defendant in its petition (p. 21), to sustain its contention do not reach the question. In *Oard* v. *Dolan*, 320 Ill. 371, 378, a physician's report attached to a petition to have a person declared insane was rejected as incompetent as original evidence to prove insanity. In *Lewandowski* v. *Zuzak*, 305 Ill. 612, 614, the court held that report of physicians appointed by court who found in such report that the decedent was insane, was properly excluded for the same reason. And *Beringer* v. *Lackner*, 331 Ill App. 591 does not decide any material question.

We submit that the Appellate Court did not err in holding that the evidence created factual issues submissible to a jury on the question of whether the defendant in the exercise of reasonable care should have anticipated the injurious effects of constant contact with diesel fuel oils, lubricating oils and chromate solutions.

We suggest on the evidence, the verdicts as entered after remittiturs were most modest; that the defendant has no just cause to complain, or any legal grounds to seek certiorari in this Court.

CONCLUSION.

Your respondents (the plaintiffs), therefore respectfully suggest that the decisions of the Appellate and Supreme Courts correctly disposed of the issues before them; that petitioner's petition for certiorari to review the decision of the Appellate Court of the First District of Illinois, should be denied.

Respectfully submitted,

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CERTIORARI

DENIED